

# **A CHECKLIST OF WINNING CROSS-EXAMINATION CONCEPTS AND TECHNIQUES**

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Most cross-examinations are conducted without real prior thought having been given to what is involved in cross-examination. Far too often a cross-examination consists of a number of unplanned questions without purpose filling in gaps in the prosecutor's case, repetition of direct testimony, and argument with the witness, all having the net effect of hurting rather than helping the cross-examiner's cause.

It is the purpose of this article to assist the cross-examiner in avoiding these difficulties by utilizing a systematic approach to this most challenging art.

## **I. GENERAL OBSERVATIONS**

The only absolute rule in the trial of a case is that everything one does, including in cross-examination, must be done with consideration of the jury's belief in one's integrity and the integrity of one's case.

In this article will appear what might be considered to be rule of cross-examination. They are not to be considered as rules! They are to be considered more as red flags since experience demonstrates that most mistakes in cross-examination are made when these red flags are disregarded. However, there are circumstances when a violation is precisely the proper tactic. If these red flags are regarded not as rules but as presumptions and the reasons for them and the dangers to be avoided are understood, then the attorney can exercise the necessary judgment.

Judgment, not rules, must determine what the cross-examiner does.

Cross-examination is a very difficult art. No reading of this article can begin to make one proficient. It takes a very deep understanding of the considerations involved, experience and an ability to make immediate judgments, and the ability to execute without having time to think. None of this should be discouraging, however, as becoming an excellent examiner will come gradually with study and experience.

The concepts and techniques important to cross-examination are overlapping and not subject to being placed into neat categories or lists. This must be kept in mind while considering the concepts and techniques listed here. It is often a combination which is useful.

It should be noted that some techniques are designed to persuade a witness to answer a question a particular way. These techniques should not be employed except to elicit an answer the examiner believes to be the truth.

Behind the concepts and techniques discussed here is psychology. We deal with what the examiner can do to produce the desired conduct on the part of the witness.

The cross-examiner must have a considerable number of concepts and techniques which are a "part of him" and are "second nature".

It is felt that the attorney is aided in this process by having cross-examination analyzed and a terminology applied to the concepts and techniques which are recurring. This is done in sports and other endeavors and it is hoped that it can be useful in cross-examination as well, thus justifying the approach of this article.

## II. PREPARATION IN GENERAL

At least 70% of the effectiveness of cross-examination is determined before the cross-examination begins. Preparation is that important!

### A. The Process of Preparation

The trial attorney does not go down a list of things to do and then consider that he is finished because he has gone through the entire list. In a general way, he will go through preparation in this order listed here. However, all of these matters are being considered by the trial attorney simultaneously. Furthermore, some thought emerging during the last phases of planning the individual cross-examination may result in additional investigation or changes in the trial plan. The process never really ends until the closing argument is completed.

### B. Background Development

#### 1. General Knowledge

A knowledge of the area covered by the testimony is a first requirement. One cannot cross-examine in a vacuum. If the witness is an identification witness, a knowledge of identification in general is essential. The same applies to psychiatry if the witness is a psychiatrist, or to criminal investigation techniques if one is to cross-examine the investigating detective. It is, of course, not possible to attain expertise in all areas but the more general knowledge one possesses, the most efficient and successful one can expect the cross-examination to be.

#### 2. Specific knowledge

Closer to home is the required knowledge of available approaches to the particular kind of testimony in question and methods of demonstrating weaknesses in that testimony. Criminal defense trial attorneys are sharing approaches as never before.

## III. PREPARATION OF THE CASE

Learning everything possible about the individual case is absolutely vital. As that is dealt with elsewhere, we will only briefly discuss certain concepts particularly applicable to cross-examination. First, learn all facts possible. The natural tendency is to investigate only those matters the importance of which is obvious before the trial. This is not sufficient as prosecution witnesses unexpectedly testify at trial to things which could be refuted if the contrary facts were known.

#### A. Prepare a Trial Notebook

Important to cross-examination are separate pages in this notebook for each witness so that all points for the examination of that witness can be listed as they occur to the attorney.

#### B. Develop a Trial Plan

A coherent, consistent defense position must be determined prior to trial. Once the defense position is formulated, each individual part of the trial -- voir dire, opening statement, cross-examination, etc., -- is tailored to advance this trial plan.

#### C. Factual Analysis

As mentioned previously, one must know every fact possible. In addition, thought must be given to what might be termed latent facts -- facts which are not found in statements, etc., but which are available on thought. Much of what the defense relies on is what was not done. The fact that the detective completed three investigatory procedures is fact. The seven others which should have been completed and were not constitute latent facts. Consideration of that which was not done leads to a cross-examination demonstrating inadequacy of investigation.

Thought about motives, reasonableness of actions, etc., will reveal additional latent facts.

#### D. Relate Cross-Examination to Summation

Important to effective cross-examination is the realization that the cross-examination and summation go hand-in-hand. The most important purpose of cross-examination is to gather material for closing argument. The examiner must know what he intends to say in closing so the necessary supporting material will be gathered.

#### E. Panning for Gold

To insure that questions asked on cross-examination elicit only favorable or useful responses, much work before trial is required.

A useful concept is "panning for gold". In searching for gold, the prospector used a pan to lift material from the bed of a stream. He would swirl the pan, causing any gold nuggets to sink to the bottom and would then throw away the useless material, keeping only the nuggets. The defense attorney should utilize discovery, preliminary hearings, hearings on motions, witness

interview, etc., to find out everything favorable to the defense (the nuggets) to which the witness will testify. The attorney can then ask about that which is favorable and nothing else.

#### F. Pinning Down the Witness

Once the "nugget" is at hand, it is important to "pin down" the witness. This means having a way of proving the witness stated the favorable thing in case the witness testifies differently on the stand. Written or signed statements, testimony at the preliminary or other hearing, and statements heard by other persons are all useful.

#### G. Create Inconsistencies

The fact that inconsistencies exist can be used with a telling effect in summation. The attorney needs to use a tough approach if the inconsistency shows calculated change in testimony and a more tolerant approach if the inconsistency merely shows lack of certainty in perception or in memory.

The word "create" is used because that is exactly what can be done at various stages before trial. Before trial, the defense must get the witness to talk often. Recollection of witnesses being as poor as psychology and our experience demonstrate it to be, inconsistencies will result. The attorney should not, however, leave the matter to chance. He should be sure the same subjects are brought up repeatedly as statements cannot be inconsistent unless on the same topic. For example, on preliminary hearing, bring up the items previously covered by the witness in his statement to the police. Bring up the same matters in interviewing the witness. By trial, the attorney will have various inconsistencies ready to be used. The important consideration is to be cognizant of the need to do this during preparatory phases of the case.

At this point, we have learned the facts, have a trial plan, have learned what is favorable to us and have the witnesses pinned down on the favorable material. We are now ready to plan the individual cross-examination.

### IV. THE PREPARATION AND CONDUCT OF THE INDIVIDUAL CROSS-EXAMINATION

A number of factors must be kept in mind to insure a planned, disciplined, safe and effective cross-examination.

#### A. Cross-Examine by Objective -- Advance the Trial Plan

Management experts teach that "management by objective" is essential for achievement. The same applies to cross-examination. Many rambling and haphazard cross-examinations are so because the examiner is "just asking questions" without any apparent goal or objective in mind. If the examiner were stopped before the cross-examination and asked his goal or objective, he should have an immediate and clear answer. The overriding objective must be to advance the trial plan by getting favorable material to be used in the closing argument. If a proposed question does

not advance the trial plan, it is unlikely to serve any useful purpose. Furthermore, by knowing the objective of a particular cross-examination the specific questions to be asked are apparent and it all falls into place.

#### B. Tailor-make Each Cross-Examination

The natural tendency of the trial attorney is to use the same manner and same technique for every cross-examination he conducts. This is analogous to the surgeon who uses the saw for everything he does. The examiner must develop a repertoire of devices, techniques, etc., and choose the appropriate instrument for the specific situation. Having his objective firmly in mind, the attorney chooses the proper tactic to elicit the testimony which satisfies that objective.

#### C. Make the Examination Psychologically Sound

The witness testifying is engaged in human behavior. Witnesses react differently. One witness if pushed may back down while another witness if pushed may remain firm and thus strengthen his testimony.

The examiner must choose the techniques to be used, the wording of the questions, the sequence of the questions, etc., which will cause the human behavior (the testimony) the attorney desires.

#### D. Get Favorable Facts

The term "favorable facts" refers to those facts which support the constructive position taken by the defense as opposed to impeachment. There are facts, for example, which would support a conclusion of misidentification, if that were the defense. Obtaining the favorable facts from the opposing witness is often ignored in the zeal to destroy him by impeachment. Instead it should be first priority.

#### E. Be Conservative

Cross-examination is dangerous! It often happens in our courts that the defendant is convicted by evidence elicited by the defense attorney -- evidence which fills in the gaps in the prosecutor's case or is extremely prejudicial to the defense. The impact is several times as great when the harmful evidence comes on cross-examination.

Several of the succeeding points are designed to reduce mistakes of commission in cross-examination to a minimum. Also the suggestions in the section on Preparation will make gambling in cross-examining far less necessary.

#### F. Consider No Cross-Examination

If there are no favorable facts to be elicited, the presumption should be in favor of no cross-examination. Saying "No cross-examination, your Honor," effectively communicates to the jury that the testimony was not important.

If a witness is "solid," develop, if possible, a defense position which recognizes the testimony as true. Aim the defense attack against a weaker point of the prosecution so no cross-examination is needed of the "solid" witness.

#### G. Don't Question Without Purpose

It seems the natural tendency is to feel that it doesn't hurt to ask and "something might turn up." Occasionally something does turn up but the percentages are substantially against the good outweighing the bad. The attorney should be in a really desperate situation before he resorts to an "all-over-the-place", vigorous cross-examination.

#### H. Don't Permit Repetition of Direct Testimony

Once again the natural tendency results in emphasizing the prosecution's evidence. The attorney has just taken notes of the direct examination and uses those notes for the cross-examination. He starts out by saying, "Mr. Witness, you just testified that ----, is that correct?" and proceeds through the entire direct testimony cementing that testimony in the minds of the jurors.

#### I. Don't Fight Losing Battles

For various reasons, attorney ask questions knowing full well that the answers are likely to be harmful to the case. Often he does this because he wishes the witness to make extensive admission when such wishes are not realistic. It is better to know what admission are possible and get just those than to try for too much and elicit denials. Furthermore, the attorney often feels that all testimony must be cross-examined or he is not doing his job. This results in emphasizing the damaging testimony and greatly increases the harmful effects from it.

It is essential to note here that the cross-examination which fails doesn't just accomplish nothing. It is harmful. It has the effect of making the testimony like cold hard steel because "it stood up under cross-examination." Testimony not cross-examined may attract less attention, may not be believed or may be considered of lesser importance, thus having less negative impact.

#### J. Don't Question Without Knowing Answer

This oft-repeated admonition is still violated in the vain hope that the answer will be something beneficial. It is a gamble which will likely produce results devastating to the examiner's case.

#### K. Don't Argue with the Witness

A large percentage of cross-examinations consists of an attorney arguing with the witness in an attempt to get the witness to agree with the attorney. Any dispassionate look convinces that this attempt is based on wishful thinking. The witness sticks to his previous conclusion and the attorney has fought a losing battle.

L. Deal with Facts, not Conclusions

A witness is highly unlikely to change his testimony and agree with the attorney on matters of conclusion. One can more easily get agreement with facts from which the attorney can reach his own conclusion on summation.

M. Don't Ask the One Question Too Many

The natural tendency when one has scored a point is to attempt to emphasize it at that time. It is important in cross-examination to know whether the witness is objective or wants the defense to lose. If the witness wants the defense to lose, there is great likelihood that the additional question will have given the witness time to recover and he will then explain or claim misunderstanding. The point is then lost.

To avoid this difficulty with this type of witness, as soon as the witness has provided that which is needed for closing argument, the attorney should stop on that point and leave the emphasis for summation.

N. Control the Witness

The examiner needs to maintain control of the witness particularly when the witness has prejudicial information and has a tendency to volunteer or wishes the defense to lose. A number of methods of control are available:

1. A training session before reaching the critical point. Utilize any possible in camera hearing or the preliminary cross-examination to teach the witness not to volunteer.
2. Use short, plain, unambiguous questions so as to give the witness no reasonable excuse for volunteering.
3. Ask only one new fact per question.
4. Use leading questions which legitimately call for only a "yes" or "no" answer.
5. Ask nothing which provides an excuse to "explain".
6. Utilize the aid of the court by requesting instruction to the witness to only answer the question.
7. Make a friend of the witness before the testimony. This makes him less likely to want to "get" the defense.

All of these methods must be used in a way which avoids the impression of withholding truth from the jury.

#### O. Decide the Manner of Cross-Examination

Thought needs to be given to what manner will best serve the cross-examiner. One must avoid the attorney's natural tendency to conduct every cross-examination in the same manner.

While there are others, the two basic ways are the friendly approach and an adversary approach. A combination in which the examiner elicits what he can with a friendly manner and then suddenly shifts to a firmer manner to disconcert the witness may be effective.

Another is the fumbling approach which leads the witness to believe that the attorney does not know critical information and therefore to decide that he, the witness, can get by with false statements.

#### P. Put the Cross-Examination in the Most Effective Sequence.

There is a most effective sequence for each cross-examination. The first point should ordinarily be an effective one. One point may be used to "set up" another. If the witness is trying to outguess the examiner so that the witness can answer opposite to that which the examiner wants, the witness may be misled by the sequence.

#### Q. End on a High Note

Above all, the examination must end on a high note. The natural tendency is to cross-examine in the same order as the direct examination or to take up the strongest point first, the next strongest second, and so on ending with the weakest point of all.

To be sure of ending on a high note, select the ending point prior to examination and list it at the bottom of the cross-examination notes with space to fill in other notes above.

#### R. Word the Question to Achieve the Purpose

How one words questions will often determine what answers will be elicited. All witnesses wish their testimony to be reasonable. Therefore, if the question is worded with the implication that the only reasonable answer is the one the examiner expects, he will probably receive that answer. For example, if the question is worded, "Mrs. Jones, I suppose it's only natural then that you expected to see the robber among the pictures shown you?", one is likely to receive an affirmative answer.

#### S. Maximize the Impact

Be brief. Emphasis is far greater if not too much is attempted. Favorable responses may be forgotten and the impact is lessened.



Consider how to make your point or points most dramatically.

Use demonstrative evidence.

Ask leading questions only and only those questions to which there will be favorable answers. This list of questions has impact because it comes across as a "list of admissions" -- a useful concept.

Another effective impact device is "stretching out a point". Use several questions instead of one to make a point.

#### T. Sustain the Momentum

A cross-examination must move and "live" if it is to be effective. Trial work must utilize the principles of show business in many respects. The examiner must know his subject so well that he does not have to study before each question and can "keep it moving".

Once again, short leading questions sustain momentum. Any response unfavorable to the examiner stops momentum and must be avoided. If, however, such an answer is given, the examiner must minimize the damage by completely ignoring what has just been said and immediately proceeding to the next question as though the response were not significant.

### V. TACTICS FOR CROSS-EXAMINATION

Planning and conducting the individual cross-examination also requires careful selection of tactics. The choice of tactic depends on the objective to be attained, the evidentiary situation, and the personality of the witness. The choice of tactic may determine success or failure.

To be useful, the tactic must be well understood along with the psychology upon which it is based. It is hoped that the following discussion will be helpful in this understanding.

#### A. Short, Plain, Leading Questions

Witness situation: The witness would like the examiner to lose and will be in control if allowed.

Execution: Momentum, impact and control of the witness is gained by questions which are short (asking as to only one additional fact per question), plain (so unambiguous that the witness cannot reasonably answer other than yes or no), leading (the examiner testifies with the witness reduced to saying "yes" or "no"). Make the examination appear to be a series of damaging statements by the examiner to which the witness must admit the truth.

This is the basic technique which must be mastered.

#### B. Stretch-out Technique

Witness situation: The witness will or must admit a point for the defense and this point needs emphasis during cross-examination.

Execution: Take the point which could be made with one question (e.g., that the rape victim told no one around about the attack) and stretch the point into a number of questions bringing admissions which all make the same point with increasing emphasis (e.g., question as to each person or group she saw to which she did not complain).

#### C. "Things Not Done" Cross-Examination

Witness situation: Witness is an investigating detective, police officer, or expert.

Execution: Make a list of scientific tests, investigative leads, etc., that should have been done or followed up in proper investigation that the jury rightfully expects. As to the "things not done", go right down the list getting admission after admission of the failures to do a proper job.

#### D. Back-Down

Witness Situation: The witness is not confident of his testimony and his personality is such that if pushed, he will back down.

Execution: "Set up" the witness by confronting him with facts as to which he is wrong (inconsistencies, etc.), then go to the crucial point and push hard for an admission that this fact was not as the witness has said, that the witness has only assumed, that the witness has only heard, that the witness does not remember, or that the witness does not really know.

It should be noted that this tactic is attempted too often. The mistake is that it is employed with the witness who does not have a personality such that if pushed he will back down.

#### E. Minimalization

Witness situation: The heart of the testimony is true, but part of it is exaggerated, inaccurate, or otherwise subject to attack.

Execution: Decrease the significance of the evidence and reduce its effect by procuring admissions as to the exaggerations, inaccuracies, etc., rather than attacking the heart of the testimony.

#### F. Collateral Cross-Examination

Witness situation: A witness or two or more witnesses are expected to be prepared as to the central thrust of their testimony but are not likely to be prepared as to matters on the fringe.

Execution: Ask questions as to the fringe material, developing contradictions and hazy recollections. This may work well on police officers who prepare by reading their offense reports

just before testifying.

#### G. Wedge (No Proof)

Witness situation: The witness probably has knowledge favorable to the defense but is reluctant and the examiner has little provable knowledge of the matter.

Execution: The little information available is stretched into several questions with a knowing attitude and the questions so worded as to lead the witness to believe the examiner knows all about the subject. A witness who believes the examiner already knows is likely to tell the whole story.

#### H. Wedge (With Proof)

Witness situation: The witness has knowledge favorable to the defense but is reluctant. The examiner has a document or other proof of the information desired.

Execution: Let the witness know of the proof and the witness will realize there is no point in withholding the information.

#### I. Trap

Witness situation: The witness is willing to lie or is lying and the examiner has the ammunition with which to demolish his testimony.

Execution: Get the witness thoroughly committed to the untruthful position and destroy him then or by later evidence. To get the witness committed:

1. Keep the objective hidden.
2. Use the fumbling approach -- pretend not to know.
3. Get the witness to take the untruthful position several times in different ways.
4. In general, go from the very general to the specific, camouflaging the objective by interspersing questions on other subjects.

#### J. Cross-Examination as to Probabilities

The witness is led into taking positions or making statements which the jury will regard as unreasonable or which can be demonstrated to be unreasonable. Examples of this technique are found in books containing cross-examination by F. Lee Bailey.

#### K. Impression Cross-Examination

Witness situation: There is no particular point with which to destroy the witness, but the total picture gives an impression favorable to the defense. Examples are that the witness does not remember, the witness is making up a story as he goes along, there was a frame-up, etc.

Execution: There is no magic formula. Create the examination so that every question adds to the impression the jury sees as it unfolds.

L. Demeanor Cross-Examination

Witness situation: The witness is subject to showing characteristics which affect credibility.

Execution: Get into areas which will cause the witness to show hostility, overzealousness in convicting the defendant, prejudice, evasiveness, etc., to the point where it is clear to the jury.

M. Channeling

Witness situation: The witness is reluctant to testify favorably to the defense and the only thing the examiner has is reasonableness of the way he thinks the event occurred and the unreasonableness of the witness's story.

Execution: Ask each question in a way such that the only reasonable answer is the one desired and believed to be true. The witness does not want his testimony to appear unreasonable or illogical.

N. Shading

Witness situation: The witness testifies to a relative matter or any matter subject to interpretation.

Execution: As no basis exists for the witness's interpretation as opposed to one more favorable to the defense, the witness, if pushed, may agree with the examiner, e.g., the time involved could have been one minute rather than five minutes.

O. Opposing Fallacies in Logic

No attempt can be made here to discuss all the possible fallacies and how to expose them. Suffice it to say that such knowledge is an important part of the cross-examiner's repertoire.

P. Dilemma

Look for situations as to which the witnesses can take only certain positions, both or all of which are helpful to the defense.

Q. Fake

Witness situation: The witness attempts to adapt his testimony so as to testify contrary to that which he feels the examiner desires.

Execution: Keep the objective hidden and mislead the witness as to the facts wanted. This is

often done by changing the sequence from that of normal conversation.

#### R. Undermining

Witness situation: The witness gives a firm opinion or conclusion, such as, "That is the man."

Execution: Do not try to get the witness to change his opinion or conclusion if this is unlikely (and it is seldom likely). Instead, bring out the underlying facts which show the lack of basis for the conclusion or that the conclusion is wrong. The opposite conclusion is then argued on summation supported by the undermining facts.

The technique is highly useful in identification cases. Undermine by getting evidence of suggestiveness, description given to police differing from that of defendant, etc.

#### S. Forging "I Don't Know"

Witness situation: Witnesses have a tendency to fill in details when they do not really remember and the proper answer would be "I don't know" or "I don't remember".

Execution: Give the witness tough questions and be firm. Then when the witness says, "I don't know," let him off the hook. Be considerate and say, "I understand, it was a long time ago," etc., to essentially teach the witness that the easy "out" is to say, "I don't know".

#### T. Tiptoeing Through the Minefields

Witness situation: The examiner does not know what answer the witness will give.

Execution: The examiner chooses as the first question in the area one which probably gains little ground but is fairly sure to gain at least some admission. The next question advances ever so slightly, and so on with the next, etc. If at any time the witness disagrees, use a backup question which will get the witness to agree the last favorable answer he gave and stop. This avoids the last question on the subject being a loss.

### VI. METHODS OF IMPEACHMENT

Impeachment is an important part of cross-examination and the following may be shown as to any witness and must be part of any checklist. They can be shown in any appropriate way.

- A. Bias, prejudice, or interest.
- B. Convictions.
- C. Bad acts.
- D. "Setting" of the witness.

One may place the witness in his proper setting identifying him with his environment. *Alford v. United States*, 282 U.S. 687, quoted and relied on in *Smith v. Illinois*, 390 U.S. 129, 19 L. Ed. 2d 956, 88 S. Ct. 748 (1968)

- E. Inconsistent statements.
- F. Inadequate perception.
- G. The combination of inadequate perception and bad memory makes it so that testimony in court is highly inaccurate providing great opportunity on cross-examination.
- H. Bad memory.
- I. Contradiction by other evidence best of all by physical evidence.

## CONCLUSION

The concepts and techniques of cross-examination discussed here are, it is hoped, enough to show how much is involved in this very challenging and useful skill. It is sincerely desired that it will interest the reader in attempting its mastery. The future development of cross-examination is for each trial attorney as we make use of our constantly expanding knowledge of human nature to find better ways of arriving at the truth.